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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CONNECTICUT

Petitioner

v.

MOHEGAN TRIBE

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did those sections of a series of Acts entitled "An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontier", which sections restricted the alienation of Indian land without Congressional Consent, apply throughout the United States, or was their application limited to Indian country so as to deny subject matter jurisdiction to the Federal Court?

2. If the Alienation of Land Sections of the Acts applied throughout the United States, did the lower court err in not finding that the "surrounded by settlements of citizens of the United States" section applied to land transactions between the Mohegan Tribe and the State of Connecticut so as to exempt Connecticut from all the other provisions of the Act?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The State of Connecticut hereby petitions that a Writ of Certiorari issue to review the Decision of the United States Court of Appeals for the Second Circuit entered in this case on December 17, 1980.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit (App. A, *infra*, 1a-29a), issued on December 17, 1980, and is not yet officially reported.

The Opinion of the United States District Court for the District of Connecticut issued on January 17, 1980, (App. B, *infra*, 30a - 52a), appears at 483 F.Supp. 597.

JURISDICTION

The Decision of the Court of Appeals, affirming the Order of the United States District Court which denied petitioner's Motion to Dismiss, was entered December 17, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the various sections of the Indian Trade and Intercourse Act of 1790 and its successor Acts.[1] Each Act is set forth in its entirety in App. C, *infra*, 53a - 91a).

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[1]Temporary Acts were passed July 22, 1790, Ch. 33, 1 Stat. 137; March 1, 1793, Ch. 19, 1 Stat. 329; May 19, 1796, Ch. 30, 1 Stat. 469; and March 3, 1799, Ch. 46, 1 Stat. 743. Permanent Acts were passed March 30, 1802, Ch. 13, 2 Stat. 139 and June 30, 1834, Ch. 161, 4 Stat. 729. The present statute is 25 U.S.C. 177.

STATEMENT

Members of the Mohegan Tribe were living on lands in the northeast section of the Town of Montville, Connecticut, lands which were sequestered for their use by the Plantation and Colony of Connecticut sometime before the date of the passage of the first Act to Regulate Trade and Intercourse with the Indian Tribes. After July 22, 1790 land sales were made in the Mohegan sequestered lands without a public treaty held under the authority of the United States.

On August 29, 1977, the Tribe brought a civil action praying for possession of the above lands and such other relief as the Court deems just claiming a violation of Section 4 of the Act of July 22, 1790, Ch. 33, 1 Stat. 137, which reads as follows:

> "Sec. 4. *And be it further enacted*, That no sale of lands made by any Indians, or any nation or tribe of Indians, within the United States, shall be valid to any person or persons, or to any State, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States."

The Mohegan Tribe also claimed violation of successor sections to Section 4, which alienation of land sections contain somewhat similar language.

The State of Connecticut moved to dismiss for lack of subject matter jurisdiction on two grounds:

First, whether the Indian Trade and Intercourse Act of 1790 and its successor Acts [hereinafter called the Act(s)], particularly those sections dealing with the alienation of lands, applied throughout the United States, including the original thirteen states, or were confined to Indian country, a place either defined in the Act, by treaty, or by both.

The other question before the Court was whether Section 13 of the 1793 Act and Section 19 of the 1796, 1799 and 1802 Acts, the so-called "surrounded by settlements of citizens of the United States" sections,[2] excepted the State of Connecticut from all the other restrictive sections of the Acts, including the alienation of land section.

The District Court, while admitting certain sections of the Act had limited territorial applicability, held that the plain language of the alienation of land section gave it force within the bounds of the United States. Is also held that "the surrounded by settlements" exception only applied to individual Indians and not to tribes, citing as authority, *Narragansett Tribe v. Southern Rhode Island Land Development Corporation*, 418 F.Supp. 790, 808, 809 (1976).

Because the questions raised were novel and had never been directly decided by any federal court, the District Court certified an interlocutory appeal pursuant to 28 U.S.C. 1292(b) which the Court of Appeals consented to hear.

The Court of Appeals agreed with the District Court that some of the sections of the Act were territorially limited, but the section dealing with the alienation of land applied throughout the United States. It had more trouble with the "surrounded by settlements" exception disagreeing with the basis of the District Court Decision that the section applied only to individual Indians and not tribes. Instead the Court of Appeals held that the "surrounded by settlement" exception, although it might apply to all other sections of the Act, was not meant to apply to land transactions.

On December 17, 1980, the Court of Appeals affirmed the Decision of the District Court.

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[2]For an example of this section, see Act of March 3, 1799, Section 19, Ch. 46, 1 Stat. 743, set out in full in App. C, *infra*, 73a.

REASONS FOR GRANTING THE WRIT

I

LONGSTANDING LEGAL RELATIONSHIPS ARE THROWN IN DOUBT

Not only does the case present novel questions of law never before this Court, but allowing a civil action such as this disturbs land transactions, some of which have gone unquestioned for nearly two centuries.

The questions are of importance to many of the old eastern states[3] which exercised jurisdiction over the Indians from Colonial times on lands never ceded to the National Government, not only with no interference from Congress, but with many actions on the part of the Executive Branch indicating its belief that the Acts had limited territorial application.

II

THE ACTS, READ AS A WHOLE, INDICATE ALL THE PROVISIONS WERE TO APPLY ONLY IN INDIAN COUNTRY

Although the District Court conceded "that at no time between 1790 and the present have the Mohegans been residents of 'Indian country' ",[4] it held that the plain meaning of the alienation of land section should not have that limited territorial applicability urged by the petitioner which confined all provisions of the Acts to Indian country, but rather held it should apply throughout the states.

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[3]The Court of Appeals indicated that there were many suits brought in the eastern states concerning land rights which have thrown into uncertainty the validity of land titles. See *Catawba Tribe of South Carolina v. State of South Carolina*, United States District Court for the District of South Carolina, Civil Action No. 80-2050-6 and *Seminole Indians of Florida v. State of Florida*, United States District Court, Southern District of Florida, Case No. 78-6116-Civ.-N.R.

[4]App. B, *infra*, 31a.

By limiting itself to the literal language of the alienation of land section, the Court ignored a cardinal rule of statutory construction that in order to determine the intent of Congress, the statute should be read as a whole. Indeed, in a recent decision, bearing on the interpretation of the Indian legislation, the Supreme Court rejected the notion that Congressional intent is to be determined by examining only the wording of the statutory section in question.

> "The complaintants' reliance on the literal language of § 4(e) and on the so-called 'plain meaning' rule of statutory construction is not entirely unpersuasive. But this assertion [as to the nonambiguity of the statute] is refuted when § 4(e) is *read together with the rest of the Act, as, of course, it must be.*" *Chemeheuvi Tribe v. Federal Power Commission*, 420 U.S. 395, 403 (1975) (emphasis added).

When the various Indian Trade and Intercourse Acts are construed as a whole, one must conclude that Congress intended all the sections within the Act apply solely in Indian country.

While both the 1790 and 1793 Acts referred at times to "Indian country", that term was not defined. However, the 1796, 1799 and 1802 Acts did describe an "Indian Boundary Line" by delineating in the first sections of those Acts a geographical boundary line based upon treaties entered into between Indian tribes and the federal government. The first section of those statutes concluded with the following significant proviso:

> "Provided always, that if the boundary line between the said Indian tribes and the United States, shall, at any time hereafter, be varied, by any treaty which shall be made between the said Indian tribes and the United States, then *all the provisions contained in this act*, shall be construed to apply to the said line so

> to be varied, in the same manner, as the said provisions now apply to the boundary line herein before recited."[5]

The insertion of the language "all the provisions contained in this Act" strongly suggests that Congress intended the Acts, in their entirety, to apply solely in Indian country.

Because of the language "in the same manner as said provisions now apply to the boundary line herein before recited", the District Court and Court of Appeals believed that the "manner" in which the boundary line applies may not be uniform from section to section throughout the Act.

There are two problems with the lower courts' interpretation. First, if they are correct, it would seem Congress would have used the words "then each provision contained in this section . . . as said provisions now apply to the boundary line herein before recited" instead of the all encompassing "all provisions".

Second, because the 1790 and 1793 Acts contained no boundary line language, one must conclude that the proviso was referring to the prior language in the same section and merely stating as the boundary to the Indian country moved west with the change in treaties, then all the provisions which presently apply to the 1796 boundary would equally apply to the new boundary. There appears to be no language in the Acts or their surrounding history to give the results reached by the lower courts.

In addition, a more general examination of all the provisions in the various Acts indicates the intent of Congress. No rational reason can be deducted from the face of the Acts why Congress would prohibit certain activities, such as hunting over the Indian country boundary line[6] or buying a horse with-

[5]Act of May 19, 1796, Ch. 30, Sec. 1, 1 Stat. 469. (Emphasis added).

[6]Act of March 30, 1802, Ch. 13, Sec. 2, 2 Stat. 139.

out a special license only in Indian country[7] and yet proscribed other transactions, such as buying or bartering instruments of husbandry or cooking utensils, throughout the United States,[8] thus extending the latter prohibitions to tribes generally.

It would be paradoxical to conclude that Congress would allow white citizens in Connecticut to hunt on Mohegan lands, when hunting was of great importance to all Indians, and to trade horses with the Mohegans because Sections 2 and 10 confined these activities solely to Indian country, but would forbid these same white Connecticut citizens from bartering instruments of husbandry and cooking utensils with the Mohegans because Section 9 does not contain words confining the activities set forth in that particular Section to Indian country.

Yet, following the District Court's rationalization of looking at each section to discern its territorial applicability, one must reach this strained and unrealistic result. Therefore, it must be assumed that Congress had a rational legislative scheme in mind when enacting these statutes, and this assumption gives further support to the view that Congress intended all provisions of the Acts to apply only to Indian country, rather than intending some sections to apply only to Indian country and others to apply throughout the United States.

Of interest is the fact that Congress used language similar to the "within the United States" of Section 4 of the Act of 1790 in another statute yet contemporary interpretation was that the statute applied only in Indian country.

In March of 1795 Congress passed a trial measure. It appropriated money for that year for the purpose of goods ". . . for supplying *the Indians within the limits of the United States* . . . ." (emphasis added) 1 U.S. Stat. 443. If read literally, the statute would have appeared to have been applicable throughout the United States — both within and without Indian country. But this was not the opinion of the Secretary of War. In

[7]Act of March 30, 1802, Ch. 13, Sec. 10, 2 Stat. 139.

[8]Act of March 30, 1802, Ch. 13, Sec. 9, 2 Stat. 139.

December of 1795, pursuant to the direction of President Washington, Secretary of War Timothy Pickering reported to the President of the United States and President of the Senate. In his report Pickering clearly indicated that the only Indians Congress intended to include under the experimental 1795 law were Indians in Indian country; to wit, the Six Nations, the tribes northwest of the Ohio River, and the four southern tribes (Creeks, Cherokees, Chickasaws, Choctaws). *American State Papers – Indian Affairs*, Vol. I, p. 583-584.

An example of the danger of using the "clear language" argument is shown where the Court of Appeals referred to Section 9 of the 1793 Act as being without geographical limitation. (App. C, *infra*, 59a). A full reading of that Section shows that the provision was to be carried out by agents. All the agents, during the periods that the various Acts were passed, were on the frontier; none were in the old New England States. (See for example *American State Papers – Indian Affairs*, Vol. 2, Document 188, page 364 et seq. See also Petitioners Brief, footnote 33, *infra*, 42).

This section was interpreted by the Executive Department as applying only in Indian country as Document 188 points out, yet the language of Section 9 never changed in any of the subsequent Acts. It is obvious despite the lack of language limiting geographical application that Section 9 was not meant to apply throughout the United States.

III

THE ACTS WERE PASSED TO PRESERVE PEACE ON THE FRONTIER.

Because of this ambiguity between the individual sections of the Act, and the Act read as a whole, one must turn to the object and purpose of the Act. *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 293 (1907). This involves an analysis of the problems which induced the enactment of the statute and a review of the general history of the period preceding its passage. The United States Supreme Court has consis-

tently employed this method of analysis when dealing with legislation relating specifically to Indians.

In its recent decision in *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191 at 206 (1978), the Supreme Court reaffirmed this analytical mode.

> "[t]hese instruments [legislation and treaties relating to Indians] . . . cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them."

This principle has been affirmed and restated in *Wilson v. Omaha Indian Tribe*, 99 S.Ct. 2529, 2537 (1979).

Petitioners believe the sole overriding purpose of the Acts was to maintain peace on the frontier with those powerful tribes that had never submitted themselves to the jurisdiction of either the states or the National Government. If petitioners are correct, there is no reason why the Act should have application anywhere but along the Indian boundary.

The lower courts concede that maintaining peace and preventing encroachment onto Indian lands was the primary object of the Acts[9] but state this was probably not the sole purpose. Yet neither court points to any other purpose.

With the exception of the 1790 and 1793 Acts, all the later Acts were entitled "An Act to Regulate Trade and Intercourse with the Indian Tribes and to Preserve Peace on the Frontiers".

Although substantial weight is usually not given to the title of an Act, the Courts will normally look to the title as a useful guide in interpreting the meaning and purpose of the legislation. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 463 (1891); *Smythe v. Fiske*, 90 U.S. 374, 380 (1874).

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[9]App. A, *infra*, 18a, and App. B, *infra*, 43a.

Of far more significance is the fact that the architects of the first Acts, President George Washington and his Secretary of War, Henry Knox, proposed them for the purpose of maintaining peace between this country and the powerful tribes on the western frontier[10] as these men well knew that the United States could not afford a whole-scale war which would be caused by the pressure of white settlers going into the lands of the frontier tribes.[11]

Certainly, it was cheaper in lives and money to prevent the intrusion of whites into Indian country, which was the underlying reason for the Indian unrest. No wonder Henry Knox, reporting to Congress on the problem, stated:

> "Although the disposition of the people of the States to migrate into Indian country cannot be effectually prevented, it may be restrained . . . by prohibiting the citizens from intruding on Indian lands." *American State Papers-Indian Affairs*, Vol 2, page 53.

According to Prucha, "the legislation [The Acts] was, rather directed against the lawless whites on the frontier and sought to restrain them from violating the sacred treaties made with the Indians." *Prucha, supra*, page 48, n. 32.

Not only did Prucha indicate the purpose of the Act, but it is important to note that he particularly refers to *Indian country* as being located on the frontier.

> "These laws, which are originally designed to implement the treaties and enforce them against obstreperous whites, gradually came to embody the

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[10]Francis Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790-1834*, (1962), pages 43-45. Father Prucha's book was cited as authoritative in this field in *Wilson v. Omaha Indian Tribe, supra*, page 2536, n. 15.

[11]See George Harmon, *Sixty Years of Indian Affairs*, pages 32, 33, on the cost in lives and money in the Indian campaigns of Generals Harmon and St. Clair.

> basic features of federal Indian policy. The first [the 1790 Act] . . . struck directly at the current frontier difficulties. To prevent the steady eating away at the *Indian Country* by individuals who privately acquired lands from the Indians, it declared the purchase of lands from the Indians invalid unless made by a public treaty with the United States." *Prucha, supra*, page 45, n. 32. (emphasis added).

Every recognized authority in the field has reached a like conclusion that the purpose of the Acts was to maintain peace with the powerful frontier tribes. In a text commissioned by the United States Department of Interior, Professor S. Lyman Tyler states:

> "[T]he maintenance of peace and of friendly relations was the first consideration of both Washington and Knox, but it was soon apparent that it took more than treaties to control the activities of those who resided on the frontier and regularly offended the Indians. The continuing requests for the executive branch for Congressional action to meet this problem were met by a series of laws 'to regulate trade and intercourse with the Indians.' "[12]

President Washington's policy in preserving peace on the frontier is shown in his dealings with Congress pushing for said legislation.

In his message to the Gentlemen of the Senate on August 7, 1789, Washington stated:

> "But the disputes which exist between some of the United States and several powerful tribes of Indians

[12]S. Tyler, *A History of Indian Policy*, page 39 (1973). The same conclusion is also reached by R. Horsman, *Expansion and American Indian Policy 1783-1812* at page 62 (1967) and Felix Cohen, *Handbook of Federal Indian Law*, pages 69-70 (1971 ed.). Cohen was also recognized as an authority by the *Wilson* Court. *Wilson, supra*, page 2536, n. 15.

> within the limits of the Union, and the hostilities, which have in several instances been committed on the frontiers, seem to require the immediate interposition of the General Government . . .". James Richardson, *Messages and Papers of the Presidents*, Volume I, pages 59-60.

In his First Annual Address on January 8, 1790, Washington discussed measures necessary to pacify the hostile tribes of Indians on the frontiers. *Richardson, ibid*, page 65. In every Annual Address thereafter, President Washington spent considerable time which was devoted to measures taken or to be taken to maintain peace on the frontier suggesting the legislation necessary to accomplish this task.

Probably the clearest message that the Trade and Intercourse Acts were passed solely for this purpose is found in Washington's Third Annual Address on October 25, 1791:

> "In the interval of our recess due attention has been paid to the execution of the different obligations which were specifically provided for by the *laws* and resolutions of the last session . . .
>
> Among the most important of these is the defense and security of the western frontiers . . ." *Richardson*, Vol. I, page 104 (emphasis added).

The importance of this part of the Third Annual Address cannot be overemphasized. The session referred to by Washington was the session of the First Congress between March 3, 1789 and March 3, 1791, when Congress had passed the Act of 1790. The recess referred to started on March 4, 1791 and ended October 24, 1791, the day before the Third Annual message. It is obvious from Washington's language that "the laws" passed by the First Congress to effect the "defense and security of the western frontiers" must have applied to the Act of 1790.

Again, in the Fourth Annual Address on November 6, 1792, immediately before the passage of the Act of 1793,

Washington urged the Congress to pass laws enforcing peace on the frontiers.

> "I cannot dismiss the subject of Indian affairs without again recommending to your consideration the expediency of more adequate provisions for giving energy to the laws throughout our interior frontier." *Richardson, ibid.* pages 125-129 at 126.

The exchange between Washington and the Senate shortly after the passage of the Act of 1796 is of great significance as to the Senate's understanding of the purpose of the Act and the *geographical area of its application.*

> "We are fully sensible of the advantages that have resulted from the adoption of measures that you have successfully carried into effect to preserve peace, cultivate friendship and promote civilization amongst the Indians on the western frontiers." Address of the Senate to George Washington, President of the United States (December 10, 1796) *Richardson, ibid.* page 205.[13]

IV

CONSISTENT EXECUTIVE BRANCH INTERPRETATION WAS THAT THE ACTS DID NOT APPLY IN CONNECTICUT

Not only did the architects of the Acts believe the purpose of the Acts was to maintain peace on the frontier and to enforce treaty rights, there has been a consistent interpretation[14] by the Executive Branch since the earliest days of this Nation that the Acts did not apply to the tribal remnants in the old New Eng-

[14] "Longstanding, contemporaneous executive and administrative interpretation by those entrusted with the enforcement of ambiguous legislation may also shed light upon an appropriate construction." *Leary v. United States*, 395 U.S. 6, 25 (1969).

land States because these Indians were under the jurisdiction of the individual states.

In 1792 Archbishop John Carroll of Baltimore requested an appropriation of funds to provide Catholic priests for various tribes including those in New England. Washington replied approving, in principle, the request as far as it applied to the tribes on the western frontier. As for the New England tribes, the President indicated the federal government had neither the responsibility nor authority to provide for them.

> "[T]hose who dwell in the eastern extremity of the United States, are, according to the best information that I can obtain, so situated as to be rather considered a part of the inhabitants of the State of Massachusetts than otherwise, and that State has always considered them under its immediate care and protections." P. Guilday, *The Life and Times of John Carroll* 607 (1954).

One may also look to the actions of numerous cabinet level officers. During the period from 1790 to 1812, six men served as Secretary of War, with the responsibility at that time for the administration of Federal Indian policy and the enforcement of the Trade and Intercourse Acts. Five of these six Secretaries were Massachusetts' citizens.[15]

Yet, during this period, Massachusetts without federal approval entered into separate treaties with the Passamaquoddy and Penobscot Indians involving enormous amounts of land, and between 1790 and 1802, the Connecticut General Assembly, on at least 13 occasions, executed 13 sales of Indian lands.[16]

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[15]Henry Knox, 1790-1795; Timothy Pickering, 1795-1796; Samuel Dexter, 1799-1801; Henry Dearborn, 1801-1809; William Eustis, 1809-1812.

[16]See Public Records of the State of Connecticut, Charles Hoadley, et al, Editors, Vol. VII, Pages 39, 142, 524; Vol. VIII, Pages 42, 122, 352; Vol. IX, Pages 376, 413; Vol. X, Pages 50, 250, 251; Vol. XI, Pages 95, 177 and 249.

It would seem inconceivable that these Secretaries of War would have been ignorant of these land transactions, and knowing of them, as they should, would have done nothing if they believed the Acts applied in the original New England States. This complete inaction also applied to Congress. During many of the debates in Congress over the passage of some of the Acts, James Hillhouse from Connecticut, who served as Chairman of the committee considering the 1796 Act, was a strong advocate of its passage.[17] One would have to be politically naive to believe Congressman Hillhouse would have pushed legislation which would put a cloud on the title of Connecticut land transactions which were then taking place.

The District Court shrugged off this argument claiming Congress would not pay much attention to a handful of land sales in Connecticut. But, these sales had to be meaningful. Congressman Hillhouse was born and brought up in Montville and his brother, William Hillhouse, was the overseer of the Mohegan Tribe.[18] It is inconceivable that a politically active family of lawyers, such as the Hillhouses, would not know the consequences of the alienation of land section of the Acts. It has to be obvious, that like all their contemporaries, the Hillhouses knew the Acts applied only in Indian country.

The various Secretaries of War, who handled Indian Affairs, recognized jurisdiction by certain states over Indian lands. Henry Knox, writing to President Washington on July 7, 1789, concerning steps to be taken to maintain peace on the frontier, recognized the state's rights to Indian lands.

> "Each individual state indeed will retain the right to preemption of all the lands within its limits which shall not be abridged . . ." *American State Papers – Indian Affairs*, Vol. 1, page 53.

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[17]Annals of Congress, Vol. V, pages 893, 897-899.

[18]Henry Baker, *History of Montville, Connecticut* 1640-1896, pages 554-562. Records of State of Connecticut, Vol. VI, pages 4, 5; Vol. VII, page 37.

When President Monroe was preparing his Preparation of a Plan for Removing of the Several Indian Tribes West of the Mississippi River, he requested Secretary of War, Colhoun, to get the names of the Indian tribes now remaining in the territories east of the Mississippi, their numbers, the quantity of land claimed by each and the amount of appropriations necessary to settle their claims and move these tribes west of the Mississippi.

Calhoun, in his report to Monroe dated January 24, 1825, asked whether the New England Indians were to be exempted from those tribes which were to be recompensed for their land and moved west.

> "The arrangement for the removal, it is presumed, is not intended to comprehend the small remnants of tribes in Maine, Massachusetts, Connecticut, Rhode Island, Virginia and South Carolina amounting to 3,023." *American State Papers – Indian Affairs*, Vol. I, page 542.

On those occasions where the various Commissioners of Indian Affairs had occasion to discuss the Act, they were of the opinion that the Act applied only in Indian country with the purpose of preserving peace on the frontier.

In his 1830 report to Congress, Commissioner of Indian Affairs Hamilton recommended a change in the 1802 boundary line. In doing so he observed:

> "It is believed that the line defined by the Act of 1802 as the Indian boundary, *and to which its provisions are intended particularly to apply*, has long since ceased to be so." Welcomb Washburn, *The American Indian and the United States: A Documentary History*, pages 16-17 (1973) (emphasis added).

In 1831 Hamilton's successor, Elbert Herring, made the same recommendation about the boundary line as Hamilton and commented:

> "Our relations with the Indian Tribes are mainly governed by the act for Congress of 1802, to regulate trade and intercourse with them and *to preserve peace on the frontier*. The boundary line, defined by the act, and to which its provisions were applicable, has been carried by subsequent treaties; and the increase of our population, and the extension of our settlement have effected changes calling for a revision of that act, that its provisions may be adapted to the present state of our Indian relations." *Washburn, ibid,* page 21 (emphasis added).

Joseph Blunt, who was a contemporary authority on federal Indian policy, was the editor of the *American Annual Register*. In the *Register* Blunt published an article, presumably written by him, which discussed Indian tribes during the Articles of Confederation period. The article noted that

> "[i]t was indeed easy to discriminate between the powerful southern and northwestern tribes, who claimed to be independent, and by their number and courage afforded substantial evidence of the strength of their claim; and those feeble remnants that were found in the eastern and middle states, and the Indian reservation. These tribes, whose numbers seldom amounted to a hundred families, deprived of the power of sustaining themselves, partially civilized, and accustomed to depend upon the protection and humane care of the local authorities, were properly considered as members of the states where they resided." *II American Annual Register*, page 72 (1827-1829)

Commissioners of Indian Affairs in the late 19th and 20th centuries were firmly of the opinion that Indians in Connecticut were not under federal jurisdiction but were "state" Indians

and should look to the State of Connecticut to solve their problems.[19]

This inaction, by itself, is entitled to substantial weight in determining whether the federal government ever believed that the Trade and Intercourse Acts ever applied in the old eastern states. It is also part of the jurisdictional history of the Acts, and, as such, is an important tool of statutory construction to interpret legislative intent. In a recent decision, involving state jurisdiction over Indian lands, the Supreme Court looked to both legislative and executive inaction as a tool in the jurisdictional history of the Act.

> "Although the subsequent 'jurisdictional history' . . . is not entirely clear, the single most salient fact is the unquestioned actual assumption of state jurisdiction over the [lands in issue] since the passage of the 1904 Act . . . Since state jurisdiction over the area within a reservation's boundaries is quite limited, . . . the fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as a part of the 'jurisdictional history'. The long-standing assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as [the Tribe] urges." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 603-605 (1977).

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[19]See letter of July 10, 1899 from W. Jones, Commissioner of Indian Affairs to Francis Morrison, Esq., App. D, *infra*, 92a - 94a and also the letter of Commissioner C. J. Rhoads dated October 12, 1931 to Mrs. Edith Smith, App. E, *infra*, 95a.

V

THE PREVAILING CASE LAW HOLDS THAT ALL PROVISIONS OF THE ACTS APPLY ONLY IN INDIAN COUNTRY

Although this Court has never had the occasion to interpret the alienation of land section of the Act and its geographical application, there are several cases that hold all provisions of the Act are confined in their application to Indian country.

The first case to so hold discussed Section 1 of the Act of 1802 which specifically described the boundaries of Indian country. The case, the *American Fur Company v. United States*, 2 Pet 357 (1829), involved an appeal over a jury instruction in the lower court on whether or not a trader forfeited all his goods, those within and without Indian country, when spiritous liquors were concealed within the goods or whether he only forfeited those goods found in Indian country. The Supreme Court ordered the lower court to instruct the jury that the only goods to be seized and forfeited were those goods found in Indian country as said country was described in Section 1 of the Act. The Court further made the specific finding that *all* the provisions of that Act applied to said boundary line.

> "The first commences in the 1st section, by declaring that a certain boundary line, therein described in general terms, as established by treaty between the United States and various Indian tribes, shall be clearly ascertained, . . . with a proviso, that if the boundary line between the said Indian tribes and the United States should at any time thereafter be varied, by any treaty which should be made between the said Indian tribes and the United States, then all the provisions contained in that Act should be construed to apply to the said line, so to be varied in the same manner as the said provisions apply, by force of that Act, to the boundary line therein before recited." *American Fur Company, supra*, page 365.

Of more significance was the holding of the Court that not only did all the provisions of the Act apply to Indian country but that all the provisions of the Act were expressly *confined* to Indian country as defined in Section 1 of the Act.

> "[B]ut lying without the boundaries of the Indian country, as they are described by the 1st section of the Act of 1802; to which *all the provisions* contained in that Act, and consequently those contained in the amendatory Act of 1822, are by that section *expressly confined.*" *American Fur Company, supra,* page 369. (emphasis added).

The term "expressly confined" is of utmost importance because one could argue a statute could expressly apply to Indian country yet by implication apply elsewhere. However, when the Court holds that all the provisions of an Act are *expressly confined* to Indian country, it is obvious that the provisions can apply nowhere else either by implication or any other means.

In 1877 the Supreme Court reached the same conclusion in *Bates v. Clark*, 95 U.S. 204, 205 (1877):

> "[The Trade and Intercourse Act of 1834,] which is a very long and important act, begins by *describing in its first section the country or territory in which that act shall be operative*. [The Court quotes section 1 of the Act, which describes that portion of the United States which shall] '. . . for the purposes of this act, be taken and deemed *Indian country*.' " (emphasis added).

It is important to note that *Bates* used the phrase "in which that act shall be operative" not "in which certain sections of the act shall be operative" nor "that section of the act shall be operative". The latter language would have been more appropriate if only some sections had that limited territorial applicability.

Bates cited *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876), where the Court held a treaty or some other Act of Congress could take a case out of Section 1 of the 1834 Act, which Section described the boundaries of Indian country. In this latter case, Justice Davis said he believed Congress had the power to enlarge what is Indian country in those lands that had been *ceded* to the United States but that Congress had not, in fact, seen fit to do so. However, he found that the circumstances of the case were covered by specific treaty reservations thus taking it out of the "Indian country" exception set forth in Section 1 of the 1834 Act.

Connecticut, of course, ceded no land within its boundaries to the United States, and the United States had no treaty with the Mohegans.

The defendants cited the recent decision of *Wilson v. Omaha Tribe* to the District Court as indicative of this limited territorial applicability although the section before the *Wilson* Court for interpretation contained no limiting language. The District Court held *Wilson* was not relevant, in part because it didn't involve 25 U.S.C. 177, and also because Section 22, the Section before the *Wilson* Court, was not added until 1822 and thus lacked a history of prior enactments. This argument is not well taken. A careful reading of *Wilson* shows the use of the following all inclusive language:

> "Indeed, the 1834 Act, which included § 22, the provision identical to the present § 194 was 'intended to apply to the whole Indian country, as defined in the first section . . . .'
>
> [I]t is apparent then in adopting section 22 Congress had in mind only disputes arising in Indian country . . . .". *Wilson*, 99 S.Ct. at 2538.

It is obvious from the above language that it was the whole "1834 Act, which included Section 22" that was limited to Indian country and not just Section 22 of that whole Act.

In *Worcester v. Georgia*, 31 U.S. 515 (1832), C. J. Marshall appears to limit United States sovereignty to "territorial boundaries", *Worcester, supra*, page 557, and again to "a boundary line established by treaties", *Worcester, supra*, page 560.

C. J. Marshall was also careful to make other observations which distinguished *Worcester* from the present civil action. On page 536 he points out that the Cherokee had denied the jurisdiction of Georgia, and, in fact, Georgia never attempted to exercise jurisdiction over the Cherokee for approximately the first 30 years of this country's existence. On page 552, he observes that the Cherokees acknowledged themselves to be under the protection of the United States and no other power, something that they had done on their surrender immediately after the end of the Revolutionary War. But most importantly, he points out on page 560 that the State of Georgia had acquiesced in the jurisdiction of the United States over the Cherokees by acts of the Georgia Legislature dealing with land cession. None of the above occurrences can be found in any dealings involving the Mohegans, Connecticut and the federal government.

Justice McLean, concurring in *Worcester*, stated:

> "In some of the old States — Massachusetts, Connecticut, Rhode Island and others — where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self-government — the laws of the State have been extended over them, for the protection of their persons and property." *Worcester, supra*, page 580.

Justice McLean's remark about these old New England tribes as being within the jurisdiction of the State and not the federal government is cited with approval in *Elk v. Wilkins*, 112 U.S. 94 (1884).

> "and which Mr. Justice McLean had in view when he observed in *Worcester v. Georgia*, 31 U.S. 515, that in some of the old states 'where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self-government, the laws of the state have been extended over them, for the protection of their persons and property.' See, also, as to the condition of Indians in Massachusetts, remnants of tribes never recognized by the treaties or legislative or executive acts of the United States as distinct political communities." *Elk, supra*, page 108.

The fact tribal remnants in New England had not been recognized by "treaties or legislative or executive acts of the United States" is a strong indication that the *Elk* Court did not believe the Acts applied to these tribes.

The question may arise concerning the absence of any section in the present Title 25 of the United States Code defining or delineating Indian boundaries. However, this question has been completely laid to rest in *Ex Parte Crow Dog*, 109 U.S. 556, 561 (1883). In this case, Justice Mathews, in a discussion of the fact that a specific reservation defining Indian country was no longer part of the Act, still held the definition of Indian country applied.

Justice Mathews was also explicit in stating what constitutes Indian country when discussing Section 1 of the Act of 1834. He held that Indian country did not include "any territory embraced within the exterior geographical limits of a state, not excepted from its jurisdiction *by treaty or by statute at the time of its admission into the Union . . . .*" *Crow Dog, supra*, page 562. (emphasis added).

Because Connecticut entered the Union in 1789, when there was no Indian Trade and Intercourse Act in existence, Justice Mathews' decision would leave jurisdiction over the respondent exclusively in the petitioner.

The dicta in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974), appears to hold differently. However, the facts in *Oneida* are different. That tribe, as well as others of the Iroqouis Nation, lay in Indian country[20] and had treaties with the Federal Government both predating and antedating the passage of the Act of 1790, treaties in which New York participated. Further, the Iroqouis were just the powerful frontier tribes at which these Acts were aimed.

Assuming arguendo that the jurisdiction of Congress over the Indian tribal land could be, or could have been, extended over all the states, including the original thirteen, it is also true that Congress can choose, or could have chosen, not to exercise its jurisdiction.

> "Since the powers of Congress over Indian affairs is plenary, it may waive or withdraw these duties of guardianship or entrust them to such agency — state or federal — as it chooses." *United States v. Hellard*, 322 U.S. 363, 367 (1944).

Even if Congress had the authority to extend the Trade and Intercourse Acts throughout the entire United States, Congress never chose to do so. Rather, in light of the considerations previously discussed, it appears that Congress intended to limit the exercise of its jurisdiction under the Trade and Intercourse Acts to that area previously described and known as "Indian country". Because Congress chose to limit the exercise of its jurisdiction, the State of Connecticut was free to exercise its jurisdiction over the Indians occupying land in that State and to enter into land transactions with those Indians.

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[20]Secretary of War Calhoun, writing President Monroe on February 8, 1822, discussed schools established in Indian country and attached a list of the schools, including a school in the Oneida Nation. *American State Papers – Indian Affairs*, Vol. 2, Pages 275-277.

In a monograph of the Institute for Government Research of the Brookings Institution, the following conclusion was reached:

> "The power exercised by the United States has been confined to what was the frontier in 1789 and the region to the west of it, the early treaties and statutes having established a definite line between the states on the east and the Indian country on the west . . . .
>
> The theory of the complete separation of the Indian Territory from that of the states accounts for the fact that Congress did not legislate for or treat with the Indians within the thirteen original states who were not on the frontier . . . . [I]t appears to be generally agreed that if Congress does not exercise its power, the states may act . . . . Thus, Congress has never attempted to legislate for or to make treaties with the Indians in Maine; on the other hand numerous treaties were made with the southern tribes occupying the frontier in western North Carolina and South Carolina and northwestern Georgia. The powers of Congress have, therefore, been exercised only in the 'Indian Country' ". L. Schmeckebier, *The Office of Indian Affairs* 6-7 (1927).

VI

THE "SURROUNDED BY SETTLEMENTS" SECTION OF THE ACTS APPLIES IN CONNECTICUT

Both of the lower courts rejected the petitioners' argument that Section 13 of the 1793 Act and Section 19 of the 1796, 1799 and 1802 Acts, "the surrounded by settlements of citizens of the United States" exception[21] would apply in Connecticut so

[21] Section 13 is set forth in App. C, *infra*, 60a and Section 19 is set forth in App. C, *infra*, 70a, 73a, 78a.

as to allow alienation of land by the Mohegans. The Court of Appeals specifically disagreed with the reasoning of the District Court.

The District Court found that the word "Indians" as used in the above meant individual Indians and not tribe, citing *Narragansett Tribe*, supra, pages 808-809, for authority. The District Court was simply incorrect in this belief and, a starting point to refute the Court's interpretation is an analysis of a typical section.

The Act of 1799, Ch. 46, Sec. 19, 1 Stat. 743, states as follows:

> "Section 19. *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of the road from Washington district, to Mero district, and of the navigation of the Tennessee river, as reserved and secured by treaty; nor shall this act be construed to prevent any person or persons travelling from Knoxville to Price's settlement (so called) provided they shall travel in the trace or path which is usually travelled, and provided the Indians make no objection; but if the Indians object, the President of the United States is hereby authorized to issue a proclamation, prohibiting all travelling on said trace, after which, the penalties of this act shall be incurred by every person travelling or being found on said trace, within the Indian boundary without a passport."

The first problem with the District Court's reasoning is the language "with Indians living on lands surrounded by settlements of the citizens of the United States". It is difficult to visualize individual Indians "being *surrounded* by settlements". In order to make any sense, that phrase must apply to small tribes and tribal remnants. Individual Indians would most

likely live within the settlements of citizens of the United States. Also, Congress uses the word "Indians" again in the same Section where it has to mean "Indian Tribe" in order to give it any real sense because one finds it difficult to believe that Congress was worrying about individual Indians objecting to travelling on the trace or that the President would be issuing proclamations as a result of objections from individual Indians.

Congress uses the word "Indians" instead of "Indian Tribe" or "Indian Nation" in other Sections of the Act where it is obvious it must mean tribe or nation.

In Section 12 of the Acts of 1796, 1799 and 1802, the alienation of land section, one finds the following language:

> "*Provided, nevertheless*, that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with *Indians*, under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the *Indians*, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.' (emphasis added).

Certainly, Congress did not intend to make treaties with individual Indians, and, in fact, has never done so; yet, the word "Indians" not "tribe" or "nation" is used twice in this proviso.

Section 13 of the Act of 1802[22] discusses agents residing "among the Indians" where it is obvious from the context of that Section that agents were to reside among tribes and not among individual Indians.

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[22]App. C, *infra*, 77a.

Section 11 of the 1799 Act[23] prevents federal employees, empowered to grant licenses, from having any interest in trade with "Indians". Following the District Court's analysis, one would have to believe that Congress intended to stop Indian Superintendents from trading with individual Indians, but, because the word "tribes" was not mentioned, they could trade with Indian tribes.

The only Supreme Court case to address this issue favored the petitioner. In *Wilson v. Omaha Tribe*, an issue before the Court was whether the word "Indians" as used in the Act of May 6, 1822, an Amendment to the Act of 1802, meant individual Indians or Indian tribe. The Court held it meant tribe because land titles were usually in the tribe and not in the individuals, and the word "Indians" used at that time usually referred to the tribe. *Wilson, supra*, pages 3536-3537.

The issue of whether the respondent was surrounded by settlements of citizens of the United States would appear to create no problem. The Mohegans lived in the Town of New London until 1786 when the Town of Montville was created out of the northern section of New London and thereafter dwelt on the border of Montville and Norwich.

A third element of Section 19 is also of importance.

> "Being within the ordinary jurisdiction of any of the individual states."

In *United States v. Cisna*, 25 Fed. Cas. 422 (1835), the Court specifically stated that tribes in Connecticut would come within Section 19 of the 1802 Act, which Section excepted a tribe in the circumstances of the Mohegans from the application of the rest of the provisions of the 1802 Act.

> "In the act of 1802 is a provision that it shall not be so construed 'as to prevent any trade or intercourse with Indians living on lands surrounded by settle-

[23]App. C, *infra*, 72a.

> ments of the citizens of the United States, and being within the ordinary jurisdiction of the individual states.' This provision applied to the condition of Indians at the time the law was passed; and at that the Wyandott tribe was not only far more numerous than it now is, but its territory was extensive and remote from a white population. They did not reside within the ordinary jurisdiction of any state. *The exception was applicable to remnants of tribes which resided in Massachusetts, Connecticut, and other Eastern states.*" *Cisna, supra,* page 423. (emphasis added)

The reasoning of the Court of Appeals that the "surrounded by settlements" exception did not apply to land transactions is equally without merit. It appears to be based on the Court's belief that the proviso in Section 1 of the Act of 1790, which has somewhat similar but not as extensive language as that of Section 13 or Section 19 of the subsequent Acts, did not apply to land transactions because Section 1 of the 1790 Act appeared to be concerned only with trade.

One problem with the Court's reasoning is that Section 1 did not apply to the old New England States. As Prucha points out in his treatise in Chapter 5, entitled *The Indian Department,* all the superintendents and departments referred to in Section 1[24] were on the frontier. There was no superintendent or department in charge of licensing anything in the old New England States. Therefore, neither Section 1 or its proviso would have applied in Connecticut.

The second problem with the Court of Appeal's analysis is the addition in Section 13 and 19 of the subsequent Acts of the language "being within the ordinary jurisdiction of any of the individual states".

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[24]See particularly *Prucha, supra,* pages 50-53 for an excellent account of the Indian Department and its geographical jurisdiction. See Lawrence F. Schmeckebier, *The Office of Indian Affairs, Its History, Activities and Organization,* Institute of Government Research, Service Monographs of the United States Government, No. 48, Baltimore, 1927, pages 1 through 42.

As a result, Section 13 and 19 would appear to apply throughout the United States, and the addition of the words "within the ordinary jurisdiction", as used in their everyday sense, don't convey an intention of Congress to exclude from the states' jurisdiction land transactions because states, then as today, ordinarily had jurisdiction over land transactions within their boundaries.

One could argue that the "surrounded by settlements" exception in all the Acts only applied to Indian country because of that proviso's origin in Section 1 of the 1790 Act. However, this logic creates a dilemma. Would it then follow that Connecticut could have no trade and intercourse with Indians within its boundaries because Connecticut was not within Indian country? Or following Petitioner's argument throughout this Brief, does it reflect the belief of Congress that no Section of the Act applied outside of Indian country?

Further, Congress would have more logically accomplished the purpose given it by the Court if it left the Section 1 proviso of the 1790 Act in Section 1 of the 1793 Act or in Section 7 of the 1796, 1799 and 1802 Acts and just made those provisos mandatory instead of discretionary. The fact that Congress put this exception in a separate section and added the language on jurisdiction must have more significance than the Court of Appeals gave it.

CONCLUSION

The Petition for Writ of Certiorari shall be granted.

Respectfully submitted,

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